SOUTH EAST ASIA INSURANCE BHD

v.

KERAJAAN MALAYSIA

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-01-142-95]
24 SEPTEMBER 1996

CIVIL PROCEDURE: *Summary judgment - Rules of the High Court 1980, O. 14 - Claim based on performance bond and advance payment bond - Whether triable issues - Construction of wordings of bond - Whether conditional or on demand bond - Interim repayments not taken into account*

One Jasib Shipyard & Engineering (M) Sdn Bhd ('Jasib') had contracted with the respondent to undertake some beach restoration works in Kuala Terengganu. The appellant gave the respondent a performance bond and also an insurance guarantee against certain advance payment made by the respondent. Subsequently, the respondent alleged that Jasib failed to perform the contract to the satisfaction of the respondent. The respondent accordingly terminated the said contract and made a demand on the appellant on the two bonds which the appellant failed to respond.

The respondent then commenced an action against the appellant and also applied for summary judgment against the appellant. The application was dismissed with costs by the registrar. On appeal, the High Court reversed the registrar's decision and entered judgment against the appellant under O. 14 of the Rules of the High Court 1980.

The instant appeal was by the appellant against the decision of the High Court. The issue before the court was whether there were triable issues based on the construction of the performance bond and the advance payment bond.

Held:
Per Shaik Daud Ismail JCA

[1] If a defendant in an O. 14 application succeeds in raising even a single triable issue, it will not be a fit and proper case to order summary judgment. It is only in plain and obvious cases where there are no issues to be tried that recourse should be had to O. 14.

[2] From the wordings of both cls. 1 and 2 of the performance bond, it would appear that the liability of the appellant under cl. 2 would only arise after a breach by the contractor mentioned in cl. 1 occured. Therefore the question as to whether the performance bond was a conditional one or an on demand one became an issue and there ought to be a trial to determine this.

[3] Another issue raised which could only be determined at a trial was whether the appellant had been given the opportunity to discuss with the respondent as provided by cl. 1 of the performance bond before the respondent took the drastic step to terminate the contract.

[4] The date of the performance bond, which was 16 May 1991, preceded the date of the principal contract, which was 25 January 1992. This raised the issue as to whether the performance bond was supplementary to the main contract, a matter that could only be resolved by evidence *viva voce*.

[5] The bond itself specified the circumstances under which a demand could be made. It required more than a mere demand or a demand simpliciter to trigger payment. The demand also had to assert the basis of the claim. The respondent had not shown whether there had been any breach committed by the contractor, something which could only be determined after a full trial.

[6] The clauses in the advance payment bond ought not to be read in isolation but as a whole. Based on the statement of defence of the appellant, certain interim repayments were not taken into account by the respondent in its amended statement of claim as well as in its summons in chambers for summary judgment. These interim repayments were also never considered by the learned judge. This raised a triable issue.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Sebuah syarikat, Jasib Shipyard & Engineering (M) Sdn Bhd. ('Jasib') telah memasuki kontrak dengan responden untuk menjalankan kerja-kerja pemulihan pantai di Kuala Trengganu. Perayu telah memberikan responden bon perlaksanaan dan juga gerenti insurans terhadap bayaran pendahuluan yang tertentu yang telah dibuat oleh responden. Kemudiannya, responden telah mendakwa bahawa Jasib telah gagal untuk melaksanakan kontrak tersebut menurut kepuasan responden. Responden berikutan itu telah menamatkan kontrak tersebut dan membuat satu tuntutan ke atas perayu terhadap kedua-dua bon tersebut yang telah gagal disempurnakan oleh perayu.

Responden kemudiannya telah memulakan tindakan terhadap perayu dan juga memohon untuk mendapatkan penghakiman terus terhadap perayu. Permohonan mereka telah ditolak dengan kos oleh pendaftar. Ketika rayuan, Mahkamah Tinggi telah mengakaskan keputusan pendaftar dan memasukkan penghakiman terhadap perayu di bawah A. 14 Kaedah-Kaedah Mahkamah Tinggi 1980.

Ini adalah rayuan oleh perayu terhadap keputusan Mahkamah Tinggi. Isu yang terdapat di hadapan mahkamah adalah samada terdapatnya isu-isu yang boleh dibicarakan berdasarkan pembentukan bon perlaksanaan dan bon pembayaran pendahuluan.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Jika defendan dalam permohonan A. 14 berjaya membangkitkan walaupun hanya satu isu yang boleh dibicarakan, ianya tidak akan menjadi kes yang wajar dan sesuai untuk memerintahkan penghakiman terus. Adalah hanya dalam kes-kes biasa dan yang jelas di mana tidak terdapatnya isu-isu untuk dibicarakan seharusnya A. 14 digunakan sebagai jalan keluar.

[2] Daripada perkataan-perkataan kedua-duanya Fasal 1 dan 2 dari bon perlaksanaan tersebut, adalah didapati bahawa tanggungan perayu di bawah Fasal 2 akan hanya berbangkit selepas kemungkiran oleh kontraktor yang tersebut dalam Fasal 1 berlaku. Dengan itu persoalan mengenai sama ada bon perlaksanaan adalah merupakan bon bersyarat atau sesuatu yang dituntut menjadi satu isu dan seharusnya terdapat perbicaraan untuk menentukan perkara ini.

[3] Satu lagi isu yang telah dibangkitkan, yang mana hanya boleh ditentukan di perbicaraan adalah samada perayu telah diberi peluang untuk berbincang dengan responden sepertimana yang diperuntukkan oleh Fasal 1 bon perlaksanaan sebelum responden mengambil langkah yang drastik untuk menamatkan kontrak tersebut.

[4] Tarikh bon perlaksanaan, yang mana adalah 16 Mei 1991, mendahului tarikh kontrak prinsipal, yang mana adalah 25 Januari 1992. Ini telah membangkitkan isu mengenai samada bon perlaksanaan tersebut adalah tambahan kepada kontrak utama, suatu perkara yang hanya boleh diselesaikan oleh keterangan *viva voce.*

[5] Bon itu sendiri menentukan keadaan di bawah yang mana sesuatu tuntutan boleh dibuat. Ianya memerlukan lebih daripada hanya tuntutan semata-mata atau suatu tuntutan mutlak untuk menyebabkan pembayaran. Tuntutan tersebut juga hendaklah menegaskan asas tuntutan. Responden telah tidak menunjukkan samada telah berlakunya kemungkiran yang dilakukan oleh kontraktor, sesuatu yang hanya boleh ditentukan selepas perbicaraan penuh.

[6] Fasal-fasal dana bon bayaran pendahuluan tidak seharusnya dibaca secara tersendiri tetapi secara keseluruhan. Berdasarkan pernyataan tuntutan perayu, beberapa pembayaran balik interim telah tidak diambil kira oleh responden dalam pernyataan tuntutan terpinda mereka dan juga dalam saman sdalam kamar mereka untuk penghakiman terus. Bayaran-bayaran balik interim ini telah juga tidak pernah dipertimbangkan oleh hakim yang bijaksana. Ini telah membangkitkan isu-isu yang boleh dibicarakan.

[Rayuan dibenarkan].

Cases referred to:
Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627 ***(refd)***
Teknik Cekap Sdn Bhd v. Public Bank Bhd [1995] 4 CLJ 697 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14

[Appeal from High Court, Kuala Lumpur; Suit No: D1-21-1-1994]

Reported by Ling Hea Hoon

JUDGMENT

Shaik Daud Ismail JCA:

This appeal is from the decision of the High Court in allowing an application by the respondent for summary judgment under O. 14 Rules of the High Court 1980. Earlier the application was dismissed with costs by the registrar. The learned judge reversed the registrar's decision and entered judgment against the appellant and also ordered assessment of damages.

One Jasib Shipyard & Engineering (M) Sdn. Bhd. contracted with the respondent to construct and complete the partially completed beach restoration works between Kuala Sungai Terengganu and Kuala Ibai in Kuala Terengganu. The appellant gave the respondent a performance bond up to the amount of RM420,645 and an insurance guarantee against advance payment for the sum of RM1,069,035. It was alleged that Jasib Shipyard failed to perform the contract to the satisfaction of the respondent and the respondent accordingly terminated the contract. Thereafter the respondent made a demand on the appellant on the said two bonds which the appellant failed to respond. This appeal before us being essentially an appeal against the order of summary judgment, the core issue is whether there are triable issues. It is well settled that if a defendant in an O. 14 application succeeds in raising even a single triable issue, it will not be a fit and proper case to order summary judgment. It is only in plain and obvious cases where there are no issues to be tried

should recourse be had to O. 14. In *Bank Negara Malaysia v. Mohd. Ismail & Ors.* [1992] 1 MLJ 400, it was held by the Supreme Court that in an application under O. 14 the court has to be satisfied on affidavit evidence that the defence has not only raised an issue, but also that the issue is triable.

The issue in this appeal and in the court below is on the construction of the performance bond and the advance payment bond. It is the contention of counsel for the appellant that both the bonds are conditional bonds and therefore a demand simpliciter is insufficient to trigger the payment mechanism. On the other hand it is the contention of counsel for the respondent that both the bonds are on demand bonds and therefore a demand simpliciter is sufficient. Therefore, if they are conditional bonds, then the issue is whether the notice of demand issued by the respondent to the appellant is a valid notice and whether this is a triable issue. It is pointed out that the respondent themselves have pleaded that the bonds are subject to certain conditions in their amended statement of claim. Therefore, they are bound by their pleadings and cannot now say that the bonds were on demand bonds. In the amended statement of claim dated 7 June 1994, the respondent in para 5 averred as follows:

> 5. Melalui Syarat Gerenti Pelaksanaan tersebut defenden bersetuju membayar kepada plaintif sebanyak RM420,645 dalam tempoh tiga bulan selepas menerima satu notis bertulis menghendaki defenden membayar kepada plaintif **jika Kontraktor melakukan apa-apa perlanggaran terhadap kewajipannya di bawah Kontrak.**

On our reading of para. 5 of the amended statement of claim it seems clear that it was drafted pursuant to cls. 1 and 2 of the performance bond itself. Paragraph 5 appears to indicate that the respondent themselves aver that what would trigger the payment mechanism is the breach of the contract by the contractor. If there was no breach of any of the terms of the contract, the question of the appellant's liability to pay would not arise. This seems to be abundantly clear from the wording of cls. 1 & 2 of the performance bond, which provides:

> 1) Jika Kontraktor (melainkan ... layak) mungkin melaksanakan kontrak mengenai apa-apa perkara atau melakukan **apa-apa perlanggaran terhadap kewajipannya di bawah kontrak,** maka Kerajaan akan, jika perlu, memberi Penggerenti peluang untuk berbincang sebelum sesuatu keputusan dibuat.
>
> 2) Penggerenti akan membayar gantirugi kepada Kerajaan sebanyak dan setakat RM420,645 dalam tempoh tiga bulan selepas menerima satu notis bertulis menghendaki penggerenti membayar kepada Kenyataan **apa-apa perlanggaran oleh Kontraktor** dengan ...

From the wordings of both the clauses above, it would appear that the liability under cl. 2 would only arise after the breach mentioned in cl. 1 occurs. Therefore the question as to whether the performance bond is a conditional one or an on demand one becomes an issue and there ought to be a trial to determine this which in turn will affect the validity of the notice issued by the respondent.

Another issue which has been raised is as to whether the appellant had been given the opportunity to discuss with the respondent before the respondent took the drastic step to terminate the contract, as provided by cl. 1. Evidence shows that the respondent called for discussions after they had terminated the contract and this action may have caused the appellant to be misled into believing a different state of affairs.

Learned counsel for the appellant also questions the validity of the performance bond as it is further and supplemental to the main contract between the respondent and the contractor, and yet the date of the performance bond, which is 16 May 1991, precedes the date of the principal contract which is 25 January 1992. This raises the issue as to whether the performance bond is supplementary to the main contract a matter that can only be resolved by evidence *viva voce.*

We are satisfied that the bond itself specifies the circumstances under which a demand can be made. It requires more than a mere demand or a demand simpliciter to trigger payment. The demand also had to assert the basis of the claim (see *Teknik Cekap Sdn. Bhd. v. Public Bank Bhd.* [1995] 3 MLJ 449). The respondent has not shown whether there had been any breach committed by the contractor, something which can only be determined after a full trial.

As for the insurance guarantee against advance payment, cl. 1 is couched with words that appear to be an on demand guarantee, but cl. 3 however provides that the sum claimed shall be automatically reduced by the amount or amounts of any payment made by the appellant to the respondent. Clause 4 provides that the sum claimed shall be automatically reduced in proportion to deductions made by the respondent out of the progress payments due to the contractor for repayment of the advance payment so made. In their statement of defence the appellant, in condescending to particulars, averred to some interim repayments having been made. These interim repayments appear not to have been taken into account by the respondent when they claimed the full amount of RM1,069,035 in their amended statement of claim as well as in their summons in chambers for summary judgment. These interim repayments were also never considered by the learned judge. With regard to this guarantee he merely mentioned cl. 1 thereof and stopped at that. The clauses in the guarantee ought not to be read in isolation but as a whole. This, to our mind, is a triable issue.

We are satisfied that there are triable issues in this case and, therefore, it is not a fit and proper case for the court to exercise its discretion to order summary judgment. It is not such a plain and obvious case as the learned judge made it out to be. We are of the view that the learned judge erred in reversing the decision of the learned registrar. We, therefore, allowed the appeal, set aside the learned judge's decision and restored the decision of the learned registrar. We also ordered costs to the appellant here and in the court below and that the deposit is to be referred to them.

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